Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Inquiry Regarding Broadband | ) | WC Docket No. 07-52 |
| Industry Practices | ) | |
| | ) | |

# REPLY COMMENTS OF THE INTERNET FREEDOM COALITION

The Internet Freedom Coalition, which is a group comprising 30 like-minded free-market, limited government non-profit associations, individuals and think tanks,[1] respectfully submits these reply comments in the above-captioned proceeding.

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The case for Internet regulation has not been made. As of the date of this filing, it will have been 1,698 days without a 'net neutrality' problem emerging in the nation.[2]

The comments submitted in response to the Commission's Notice of Inquiry ("NOI") illustrate the fundamental philosophical rift in the net neutrality debate – namely, whether marketplace arrangements between consumers, network service

[1] Internet Freedom Coalition, http://www.internetfreedomcoalition.org.
[2] The IFC dates the birth of calls for Internet regulation to November 2, 2002, *see* http://www.netneutralityscareticker.com, when Internet application companies first introduced 'net neutrality.'

providers, and application and content providers should continue to drive the growth of the Internet, or instead whether pervasive legal and regulatory micromanaging should attempt to dictate completely 'neutral' networks. The comments favoring net neutrality regulation rest on unfounded predictions - which are well past their "sell by" date[3] - that Internet service providers would engage in practices that would relegate customers to "the digital equivalent of a winding dirt road."[4] As exemplified by the submitted comments, the crisis-in-theory outgrowth of these prognostications has not, after more than half a decade, turned into a crisis-in-fact. In short, the broadband access market is not evolving in a way that "end of the Internet" millenarians said it would.

## I. Effective Oversight Mechanisms Already Exist

In the absence of *any* significant evidence that Internet service providers are engaging in practices that adversely impact consumer welfare, the FCC should continue to refrain from adopting prescriptive *ex ante* regulations, even as it recognizes that the potential for anticompetitive conduct still exists. Over the past ten years, under both Democratic and Republican FCC chairmen, the FCC has evolved policy statements that strike the appropriate balance, containing a strong preference for "neutral" connectivity principles.[5] The FCC's swift enforcement of its policy statement in the Madison River port blocking case remains the *only*

[3] *See*, *e.g.*, Lawrence Lessig, *The Internet Under Siege*, Foreign Policy (2001).
[4] Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, The Washington Post (June 8, 2006).
[5] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14986 (Rel. Sept. 23, 2005).

documented instance where the FCC has received a formal net neutrality complaint,[6] reducing the net neutralist position to mere conjecture.

Of course, the FCC is not the sole agency with oversight authority in this arena. Following an extensive comment period plus a series of workshops that included witnesses from academia, industry, and consumer groups, the Federal Trade Commission ("FTC") recently released a comprehensive report that calls for regulatory restraint.[7] After observing that there is no evidence of a market failure or demonstrated consumer harm in the broadband marketplace, the FTC recognized that the competitive issues raised in the net neutrality debate "are not new to antitrust law, which is well-equipped to analyze potential conduct and business arrangements involving broadband Internet access."[8] The enforcement of existing antitrust and competition policy principles by three federal agencies – the FCC, FTC and the Department of Justice – is further buttressed by the "heightened awareness" of net neutrality issues among regulators, broadband competitors and consumers alike.[9]

Instead of acknowledging the realities of the current regulatory environment, net neutrality proponents have put on the blinders, calling instead for net neutrality regulations that are driven by aspirational (and oftentimes anti-corporatist) visions of what the Internet should be. As noted economist Alfred Kahn

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[6] Madison River Communications LLC and Affiliated Companies, Consent Decree, File No. EB-05-IH-0110 (Mar. 3, 2005). It should be noted that the Madison River example – which involved an anticompetitive response by an incumbent monopolist to a VoIP service that threatened its existing revenue stream – is not a case from which to generalize a net neutrality rule.

[7] Federal Trade Commission, *Broadband Connectivity, Competition Policy* (June 2007) (hereinafter "FTC Report").

[8] *Id.* at 11.

[9] *Id.*

has observed, however, the concerns raised by net neutrality proponents essentially boil down to anticompetitive vertical price squeezes, exclusion of access, and denials of prioritized service - all of which have already been condemned by the FCC and emphatically *should* be condemned under the antitrust laws.[10] Responding to the critique that the application of antitrust to resolve these issues would be "counterproductive," Professor Kahn countered: "that is exactly what it is or should be about or – their rhetoric about "monopoly and "discriminations" and squeezes notwithstanding – the [net neutrality] advocates are really talking about social goals that cannot be achieved by a market economy."[11]

## II. Net Neutrality Regulation Could Stall Competition and Innovation

Proposals for net neutrality regulation appear to be based on the following two premises:

* First, as the operators of "bottleneck" facilities, broadband access providers should be subjected to special regulatory treatment.

* Second, the business practices of these entities can be effectively addressed through a rule that distinguishes between beneficial practices and instances of anticompetitive "discriminatory" conduct.

Both premises are false.

The FTC has stated that the current status of a "dynamic, competitive marketplace" for broadband Internet access "challenges the claims by many

[10] Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159, 176 (2006).
[11] *Id.*

proponents of network neutrality" that meaningful last-mile competition is wanting. The FTC's assessment rested on its observations that, on a national scale: (1) consumer demand for broadband is growing rapidly; (2) access speeds are increasing; (3) speed-adjusted or quality-adjusted prices are falling; and (4) new entrants, particularly those deploying wireless broadband technologies, are poised to challenge the incumbent cable and telephone companies.[12] Vigorous competition between cable operators, telecommunications companies and these new entrants ensures that these providers will continue to seek innovative ways to maximize value to the highest number of customers. As such, former FCC Chairman Powell's recognition that "the case for government imposed regulations regarding the use or provision of broadband content, applications and devices is unconvincing and speculative" applies with equal force today.[13]

Proactive regulation is not a panacea. As a guiding principle, prescriptive *ex ante* rules should only be considered "when experience provides a compelling case that such rules are necessary to protect consumer welfare."[14]

Despite a record that constitutes hypothetical, forward-looking claims of "discrimination," net neutrality proponents have nevertheless committed the cardinal sin of casually assuming that regulation will be both costless and effective. Given the dynamic nature of the broadband access market, the already-intense

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[12] FTC Report at 155-56.
[13] *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks of FCC Chairman Michael K. Powell at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law (Feb. 8, 2004).
[14] Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 57 (2007).

competition between cable operators and telecommunications providers, and intensifying competition from wireless broadband providers, municipalities, and satellite, even a perfectly informed regulator will be unable to make a sound predictive judgment on what the optimal long-term structure of the broadband market should be.

In recognition of this limitation, the FTC has cautioned against net neutrality regulation because "we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace."[15]

The FTC's exercise in regulatory humility lies in stark contrast to what has been proposed by those demanding Internet regulation. In describing the effects of overzealous antitrust scrutiny, Judge Easterbrook has explained how broad, unclear regulation will deter experimentation and innovation in the marketplace:

> When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery . . . The higher the stakes, the more firms are willing to spend on discovery and litigation.[16]

Thus, if there is a threat that every network management issue is going to be second-guessed by a regulator, the broadband access market will be *de facto*

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[15] FTC Report at 10.
[16] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984).

structurally separated, with regulators scrutinizing and presumptively prohibiting all vertical relationships or any network practice that *might* affront regulators' conceivable notions of 'neutrality.' While these disputes play themselves out, broadband service providers and applications providers will be deterred from making investments and innovating. In addition to chilling investment, net neutrality rules will inhibit or prohibit agreements between broadband service providers and applications companies that might guarantee service quality or bring lower prices to consumers.

The debate is further muddied by the proponents' scattershot definitions of what constitutes net neutrality, which ambiguity is antithetical to the notion of rational regulating. The past is prologue. In light of the massive market distortions and decade of litigation that resulted from the FCC's efforts in defining unbundled network elements under the Telecommunications Act's "impairment" standard,[17] as well as the litigation and uncertainty that resulted from the FCC's determination of the appropriate "cost" for these unbundled network elements,[18] the pitfalls of basing an industry-wide regulatory scheme on the interpretation of an ambiguous rule are firmly established.[19]

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[17] *See* 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (concluding that the Commission's fourth attempt to implement the unbundling provisions of the Telecommunications Act of 1996 was "a charm.").

[18] *See Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[19] Similarly, the failure of the Commission's Open Network Architecture rules in 1980s and its cable open access rules earlier in this decade demonstrate that mandating "openness" rarely works and deters investment.

Moreover, net neutrality definitions that would seek to prohibit "access-tiering" arrangements ignore the two-sided nature of broadband markets, particularly in the age of user generated content and BitTorrent, and envisioning what these services portend. Broadband service providers serve as intermediaries that attract consumers through the provision of content and applications on the one hand, and support the providers of content and applications on the other. In this environment, it is not obvious that customers – end-users -- should be required to pay the lion's share of the access provider's cost.

By way of example, Google is planning to offer free wireless broadband access to customers in San Francisco that will be subsidized, at least in part, by online advertising.[20] This kind of experimental business model (which should be encouraged) is predicated on the notion that "many end-users demand discounted or free broadband access that is paid for by parties other than themselves."[21] To be sure, the possibility that broadband service providers may be tempted to enter into exclusive deals with applications providers raises legitimate concerns, but these issues can be handled through the application of existing competition policy and antitrust principles.

[20] Verne Kopytoff, *Delays in Wi-Fi Talks for S.F. Frustrate Google Executive*, San Francisco Chronicle (Sept. 16, 2006).
[21] J. Gregory Sidak, *A Consumer-Welfare Approach to Net Neutrality Regulation*, 2. J. COMPETITION L. & ECON. 349, 352 (2006).

## III. Conclusion

However they are defined, calls for net neutrality share a common purpose: in the wake of the U.S. Supreme Court's *Brand X* decision and the Commission's *Wireline Broadband Internet Access Order*, these are efforts to re-regulate mandated equality and commoditize the offering of broadband access to the Internet. Net neutrality, then, is not just a solution in search of a problem, but it is a solution with such indistinct contours and broad reach that it threatens investment and innovation in the Internet.

The FCC should follow the FTC's lead in recognizing that adequate legal remedies for rectifying discriminatory and anti-competitive behavior already exist. Otherwise, the net neutrality rule will become a Narcissus pool for different academic, social and corporate agendas, reflecting back multifarious results that its overzealous proponents would like to see. Such regulatory leaps of faith into the unknown, when unjustified by facts or defined with clarity, threaten to harm consumers, stifle investment and dampen competition. The FCC should use this NOI to reaffirm its commitment to an unregulated Internet.

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